Government of Canada / Gouvernement du Canada

Drinking Water and Wastewater in First Nation Communities

Discussion Paper:

Engagement Sessions on the Development of a Proposed Legislative Framework for Drinking Water and Wastewater in First Nation Communities

Winter 2009

Canada

Table of Contents

I.	Introduction	2
II.	Executive Summary	3
III.	Objective of the Engagement Sessions	5
IV.	Background	6
V.	Potential Scope of Legislative Framework	9
VI.	Possible Elements of a Legislative Framework	12
VII.	Current Roles and Responsibilities	17
VIIII.	Compliance	19
IX.	Questions to Consider	22
X.	Frequently Asked Questions	26
XI.	Additional Comments / Contact Information	32
XII.	Notes	33

I. Introduction

This discussion paper is intended for use by participants at upcoming engagement sessions, as part of a consultation process leading to the development of a legislative framework for drinking water and wastewater in First Nation communities. It is hoped that the information provided within this paper will help inform participants and assist them to prepare for the sessions in advance. Should participants wish to provide written comments, Indian and Northern Affairs Canada (INAC) will accept written submissions at the engagement sessions and via e-mail, fax or mail until April 17, 2009 (please see "Additional Comments/Contact Information" section, for further details).

The following information website is available online to support the consultation process: www.ainc-inac.gc.ca/enr/wtr/h2o/index-eng.asp.

This website will provide further information on the engagement sessions, and serve as an easy reference to relevant reports and websites relating to drinking water and wastewater in First Nation communities (including an electronic copy of this Discussion Paper). The website will also provide contact information and serve as a means to post written submissions (please see "Additional Comments/Contact Information" section for further details).

While this paper discusses elements of a proposed legislative framework (such as scope, operator certification, etc.) and ways of compliance, please note that this paper is simply for reference to inform debate and discussion at the engagement sessions. Feedback and comments from all participants in these sessions will be included in the minutes of the sessions and reflected in the report and recommendations to the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians.

II. Executive Summary

The provision of safe drinking water and the effective treatment of wastewater are critical in ensuring the health and safety of First Nation people and the protection of source water on First Nation lands. While legislation for drinking water and wastewater has been developed in provinces and territories, such legislation for drinking water and wastewater in First Nation communities does not currently exist. It is for this reason that Indian and Northern Affairs Canada (INAC) intends to work with First Nations to establish a legislative framework for drinking water and wastewater in First Nation communities.

During spring/summer 2008, INAC met with First Nation organizations and provincial/territorial officials to share information and to prepare for meaningful and successful engagement sessions scheduled to begin in winter 2009. Many First Nation organizations and provincial/territorial officials provided positive feedback and expressed interest in participating in further engagement sessions.

Commencing in winter 2009, INAC will undertake an engagement process leading to the development of a legislative framework for drinking water and wastewater in First Nation communities. This will consist of consultations with First Nations, regional First Nation organizations, and provincial/territorial officials.

Further activities stemming from these consultations include:

- A report on the consultations will be prepared for the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians;

- Development of enabling legislation to allow for eventual creation of regulations; and

- Introduction and passage of this legislation through Parliament.

Participants at the engagement sessions will be encouraged to discuss and provide input on the federal government's preferred option of incorporating by reference (reproducing) provincial/territorial regulations and adapting them, as required, to meet the needs of First Nation communities. INAC will be seeking solutions and recommendations from First Nations, regional First Nation organizations and provinces/territories on how to best address the regulatory gap that presently exists regarding drinking water and wastewater in First Nation communities. Advice and traditional knowledge from elders and others regarding drinking water and wastewater will also be taken into consideration.

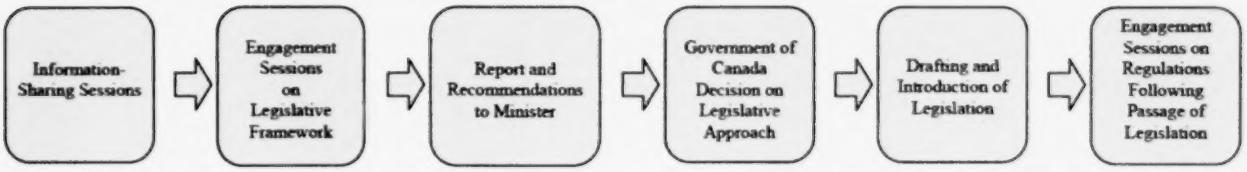
At the conclusion of these sessions, a report on the consultations will be provided to the Minister. This report will contain a summary of the views expressed by

participants at the engagement sessions and in written submissions, and this report will be taken into consideration during the development of proposed legislation.

Once proposed legislation has been developed and passed by Parliament, further engagement with First Nations, regional First Nation organizations, and provinces/territories will take place on the development and implementation of federal regulations. This further engagement will likely take place over the course of several years, and First Nations will play a role in all stages of the consultation process.

The timing and implementation of each of these activities will vary depending on the results of consultations and the decisions taken by the Government of Canada.

Proposed Legislative Process


Information-Sharing Sessions
Engagement Sessions on Legislative Framework
Report and Recommendations to Minister
Government of Canada Decision on Legislative Approach
Drafting and Introduction of Legislation
Engagement Sessions on Regulations Following Passage of Legislation

III. Objective of Engagement Sessions

The purpose of the engagement sessions is to obtain the input of First Nations, regional First Nation organizations, and provincial/territorial officials on the federal government's preferred option of incorporating by reference (reproducing) provincial/territorial regulations and adapting them, as required, to meet the needs of First Nation communities. This was one of three viable regulatory options suggested by the Expert Panel on Safe Drinking Water for First Nations.

INAC will be seeking solutions and recommendations from First Nations, regional First Nation organizations and provincial/territorial officials on how best to address the regulatory gap that presently exists regarding drinking water and wastewater in First Nation communities. Advice and traditional knowledge from elders and others regarding drinking water and wastewater will also be taken into consideration.

Through open dialogue among all participants (including First Nations, regional First Nation organizations and provincial/territorial officials and representatives from the federal government), attendees at the engagement sessions will be provided with an opportunity to discuss the elements of a proposed federal legislative framework for drinking water and wastewater in First Nation communities. These elements could include the following:

- appeals mechanisms for regulatory decisions;
- compliance (both promotion and enforcement aspects);
- design approvals;
- emergency planning and response;
- monitoring;
- non-piped water delivery systems;
- occupational health and safety;
- operating approvals for drinking water and wastewater facilities;
- operator certification;
- procurement, construction and commissioning;
- reporting;
- roles and responsibilities;
- source water protection;
- third-party audits;
- water withdrawal and use; and
- wells and septic systems for individual service.

Report for the Minister

The other objective of the engagement sessions is to provide the Minister with clear advice on the proposed approach, as well as advice regarding specific elements of a proposed federal legislative framework (such as scope, roles and responsibilities, compliance, etc.). This will be provided in a report to the Minister, which will be taken into consideration during the development of legislation.

IV. Background

OVERVIEW

In 2005, the Commissioner of the Environment and Sustainable Development (of the Auditor Generals' office) reported and recommended that: "*Indian and Northern Affairs Canada and Health Canada, in consultation with First Nations, should develop and implement a regulatory regime for drinking water in First Nations communities. This regime should be comparable with that in provinces and designed to protect the health and safety of First Nations people.*"

In March 2006, the federal government launched a Plan of Action for Drinking Water in First Nations Communities (Plan of Action) to address the most serious water-quality problems on reserve, establish national standards for the operation of treatment facilities, and ensure mandatory training for all treatment-plant operators. As part of the Plan of Action, a panel of experts was established to advise on options for an appropriate legislative framework.

Expert Panel

The Expert Panel held a series of public hearings across Canada over the summer of 2006, hearing from over 110 presenters and receiving more than two dozen written submissions. Presenters included representatives from 39 First Nation communities, 31 First Nation organizations, various provincial and territorial ministries, private-sector organizations, other federal government departments, etc.

Once the public hearings were completed, the Expert Panel produced a report containing a comparative analysis of options for a legislative framework. In December 2006, the *Report of the Expert Panel on Safe Drinking Water for First Nations* was tabled in Parliament. In its report, the Expert Panel identified five possible options for creating a legislative framework for safe drinking water in First Nation communities:

- existing provincial regimes could be used, as "laws of general application";
- regulations might be passed by Orders in Council under existing federal statutes;
- Parliament could enact a new statute setting out uniform federal standards and requirements;
- Parliament could enact a new statute referencing existing provincial regulatory regimes (incorporating by reference provincial/territorial regulations); or

- First Nations could develop a basis of customary law that would then be enacted in a new federal statute.

The Panel suggested that only the last three options were viable.

For more information on the Expert Panel, please use the following link:

www.eps-sdw.gc.ca

Senate Report

On June 5, 2007, the Standing Senate Committee on Aboriginal Peoples released its report "*Safe Drinking Water for First Nations*".

In the report, the Committee agreed with testimony from the Assembly of First Nations and the Expert Panel that necessary funds for all identified resource needs of First Nation communities in relation to the delivery of safe drinking water should be dedicated by INAC, and should be a precondition to legislation. The Committee also expressed concern that INAC was proceeding with a legislative approach that was likely to be resisted by First Nations and could create a patchwork of regulations and standards across the country (meaning regulatory regimes may end up differing from province-to-province and territory-to-territory). The Committee felt it had not received assurance that INAC is considering comprehensive consultations, as recommended by the Expert Panel.

In the report, the Committee made the following recommendations:

RECOMMENDATION #1: INAC should undertake an independent needs assessment, of both the physical assets and human resource needs of individual First Nation communities.

RECOMMENDATION #2: INAC should undertake a comprehensive consultation process with First Nation communities and organizations regarding legislative options, with a view to collaboratively developing such legislation.

In response to Recommendation #1, INAC will assess both the physical assets and human resource needs of individual First Nation communities by conducting a national engineering assessment of drinking water and wastewater systems in First Nation communities. This assessment is expected to take place over an eighteen-month period, beginning in winter 2009.

In response to Recommendation #2, INAC is undertaking a consultation process leading to the development of a legislative framework for drinking water and wastewater in First Nation communities. Engagement sessions with First Nations, regional First Nation organizations, and provincial/ territorial government officials will be held in winter 2009.

To view the Committee's report, please use the following link:

http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/abor-e/rep-e/rep08jun07-e.htm

Budget 2008

In Budget 2008, the Government of Canada committed to investing over $330 million over two years to improve access to safe drinking water in First Nation communities. In April 2008 the Government announced that this money would be invested through the *First Nations Water and Wastewater Action Plan*. This included a commitment to undertake consultations with First Nations and provincial and territorial governments on the development of legislation to oversee water quality on reserves.

To view this budget commitment, please use the following link:

http://www.budget.gc.ca/2008/plan/chap4a-eng.asp

Environment Canada's Consultations re: *Proposed Regulatory Framework for Wastewater (October 2007)*

From fall 2007 to winter 2008, Environment Canada consulted with First Nations and other interested parties to obtain their input on proposed wastewater effluent regulations under the existing authority of the federal *Fisheries Act*. These proposed federal effluent quality regulations will apply to all wastewater facilities in Canada, including those in Aboriginal communities. Environment Canada is considering all the input received from First Nations and other interested parties to prepare draft regulations for publication in *Canada Gazette*, Part I in 2009 (specific date to be confirmed).

To view Environment Canada's document *Proposed Regulatory Framework for Wastewater (October, 2007)*, please use the following link:

http://www.ec.gc.ca/eu-ww

Information-Sharing Sessions

During the spring/summer of 2008, INAC undertook information-sharing sessions with First Nation regional organizations, regional INAC colleagues and provincial/territorial officials. The intent of these sessions was to share information and to adequately prepare for meaningful and successful engagement sessions scheduled for winter 2009. Many regional First Nation organizations and provincial/territorial officials provided positive feedback and expressed interest in participating in the upcoming engagement sessions.

V. Potential Scope of Legislative Framework

Current Legislative and Regulatory Gap

While provincial/territorial regulations to ensure safe drinking water and quality wastewater have been developed in all provinces and most territories, federal regulations for drinking water and wastewater in First Nation communities do not currently exist. The *Protocol for Safe Drinking Water for First Nations Communities* (the Protocol) sets out clear standards for the design, operation and maintenance of drinking water systems, but there is no legislative base to ensure compliance with the Protocol. [1]

Advantages of Establishing a Federal Regulatory Regime for First Nation Communities

Legislation has a number of clear advantages. First, a well-designed and managed legislative framework for drinking water will protect public health by reducing the risk of water borne diseases, to which children and the elderly are particularly susceptible. Legislation is also very effective when there is a need to clearly define the roles, responsibilities and powers of all the key players. Legislation will also likely be the preferred option if there needs to be a legal basis for compliance.

Scope of a Federal Legislative Framework

According to the Expert Panel, legislation should apply to all elements of drinking water and wastewater systems, including drinking water treatment and distribution, and wastewater collection, treatment and release. All of these elements would be covered by INAC's proposed legislative framework, with the exception of wastewater effluent release, which would be covered by the regulations being developed by Environment Canada under existing authorities of the federal *Fisheries Act*.

The Federal Government's Proposed Approach

The federal government's proposed approach of incorporating by reference provincial/territorial regulations and adapting them as required to meet the needs of First Nation communities would provide the Government of Canada with the authority to make federal regulations, in each province/territory, that would be

[1] Similar protocols for wastewater and decentralised (on-site) systems have been drafted by INAC and were shared with First Nation technical experts at three separate workshops that took place in fall 2008. The purpose of these workshops was to review the wastewater and decentralised (on-site) systems protocols, and to update the current drinking water protocol.

similar to existing regulations for drinking water and wastewater in that province/territory. However, since most provincial/territorial regulations have not taken small, rural and isolated communities into consideration, the federal government will need to add appropriate provisions to federal regulations that are not currently part of provincial/territorial regulations. For example, a provision for tanks/cisterns (which are not usually part of provincial/territorial regulations) would need to be added in federal regulations, as water in small, rural and isolated communities is often distributed by tanker truck and stored in individual/community tanks/cisterns.

It should be noted that incorporating by reference provincial or territorial regulations would not take jurisdiction from, or give jurisdiction to, provinces or territories or First Nations, but rather would produce federal legislation consistent with the provinces and territories.

Advantages of the Federal Government's Proposed Approach

Federal regulations made under proposed legislation based on the option of incorporating by reference (reproducing) provincial/territorial regulations would contribute to the provision of safe drinking water and quality wastewater in First Nation communities by ensuring comparability with existing, well-understood regimes.

Providing a similar legislative environment between First Nation communities and off-reserve communities within provinces and territories has a number of advantages. First, it is fair, in that it provides the same level of protection to public health as neighbouring jurisdictions. Second, it provides the opportunity for greater and more consistent collaboration between First Nation communities and municipalities on drinking water and wastewater services, whether that be the sharing of drinking water and wastewater systems, training opportunities for First Nation peoples on various aspects of drinking water delivery, the ability to hire contractors from off-reserve who are familiar with the legislative/regulatory regime, or promoting cost effectiveness through economies of scale. Finally, a similar legislative environment would provide a common base with which to evaluate the effectiveness of the operation, design and maintenance of drinking water and wastewater systems in First Nation communities. This would, in turn, increase certainty for both the public and operators of water systems in First Nation communities.

This proposed framework would provide First Nation communities with regulated drinking water and wastewater standards that are on par with standards imposed off reserve. The federal government recognizes that many provinces have long had legislation in place and the expertise required for ensuring water quality and safety off reserve, and as noted above, a new federal framework would build upon and, where necessary, modify the existing provincial or territorial regulations. This would provide for flexibility, as federal regulations would vary

from province to province and territory to territory. This proposed approach would also increase the possibility of provincial, territorial, municipal and First Nation participation in the delivery of drinking water and wastewater services to First Nation communities.

VI. Possible Elements of Legislative Framework

The Expert Panel's Report on Safe Drinking Water for First Nations listed specific elements of a legislative framework that the Expert Panel felt should apply to First Nations.

Based on this report, the following list of potential elements has been prepared. These elements would apply to a legislative framework for both drinking water and wastewater in First Nations communities.

It should be noted that once proposed legislation has been passed by Parliament, further engagement with First Nations, regional First Nation organizations, and provinces/territories will take place on the development and implementation of federal regulations. This further engagement will likely take place over the course of several years, and First Nations will play a role in all stages of the consultation process.

This list of elements is intended to serve as a basis for discussion at the engagement sessions. The proposed elements are as follows:

1) Appeals mechanism for regulatory decisions

Alberta, British Columbia and Ontario provide administrative tribunals that hear appeals of approvals, orders, or administrative penalties. Appeals may be brought by the regulated community or others affected by the decisions of the regulator. These tribunals, which are quasi-judicial bodies, provide a mechanism to assure checks and balances with appropriate public involvement surrounding regulatory decision-making.

2) Compliance

The federal government would work with First Nation communities to assist them in enhancing their capacity to meet any new regulatory requirements.

The most detailed inspection, investigation and prosecution program related to drinking water and wastewater facilities is now found in Ontario. Other provinces have specified varying degrees of detail regarding their powers of inspection. Careful consideration of the most effective ways of ensuring compliance with regulations on First Nation communities will need to take place to ensure emphasis is placed on prevention, rather than penalty.

3) Design approvals

Approval of the design of drinking water and wastewater facilities is required under the regulatory regimes of most jurisdictions in Canada, with many of the basic concepts derived from detailed approaches to regulating drinking water and wastewater treatment developed by the U.S. Environmental Protection Agency. Alberta has published detailed design standards as guidance for their approval process. Most jurisdictions in Canada issue permits for the construction of wastewater collection and treatment systems.

4) Emergency planning and response

Most provincial jurisdictions make reference to contingency planning and requirements for backup of critical systems (including power) or spills from wastewater systems. Explicit requirements for developing an emergency response plan for drinking water and wastewater facilities are specified in Alberta, British Columbia and Manitoba. It is in these most stressful of circumstances that clearly specifying the roles and responsibilities of various partners is most crucial, and a good regulatory regime will spell these out in some detail.

5) Monitoring

Monitoring occurs to measure whether a system is performing at the appropriate level based on its design and for compliance purposes if a regulation is in place. For drinking water, monitoring covers water quality and treatment performance, including source water, process performance, treated water and distribution system quality. It also covers quality standards: chemical, microbiological, physical and aesthetic parameters. For wastewater, monitoring covers typical parameters for indicating the level of effluent quality being achieved by the system.

Compliance monitoring (monitoring treated drinking water or wastewater effluent to ensure standards are met) is well established in most provincial regulatory regimes. Process performance monitoring is also required to varying degrees in provincial regulatory operating approvals.

On quality parameters for drinking water, the Guidelines for Canadian Drinking Water Quality are endorsed by a federal/territorial/provincial committee. Individual provinces/territories differ in terms of how they make use of the quality parameters. There is not any evident need for differing parameters to be developed as long as they are used as guidelines. If all these water quality parameters were adopted as enforceable standards, there may be a need to consider variation to meet local needs for some values, such as total dissolved solids, that are more aesthetic than health-based.

6) Non-piped drinking water delivery and wastewater collection systems

In non-urban, low-density areas, drinking water is often distributed by tanker truck and stored in individual tanks or cisterns and sewage removed by tanker truck from household holding tanks and delivered to treatment systems. Regulations governing some aspects of such systems have been developed in New Brunswick, Northwest Territories, Yukon, Quebec and Saskatchewan.

7) Occupational health and safety

The Workplace Hazardous Materials Information System, a comprehensive plan for providing information on the safe use of hazardous materials used in Canadian workplaces, is governed by a series of complementary federal, provincial and territorial legislation. Federal legislation requires suppliers/importers of hazardous materials (controlled products) to provide adequate labels and material safety data sheets as a condition of sale and importation, while provincial and territorial occupational health and safety legislation requires that controlled products in the workplace are properly labelled, material safety data sheets are made available to workers, and workers are provided with relevant training in the workplace (except for workplaces under federal jurisdiction, where the provisions of the amended Canada Labour Code apply).

Drinking water and wastewater treatment and delivery systems involve a number of occupational hazards ranging from hazardous chemical use, to confined space and various maintenance hazards. All provinces and territories have some form of occupational health and safety regulations that should be duplicated for facilities in First Nation communities.

8) Operating approvals for drinking water and wastewater facilities

All provincial jurisdictions in Canada require some form of permit or operating approval to run community drinking water and wastewater systems. The details of operating requirements vary from one province/territory to another and may also vary with facility size.

9) Operator certification

Operator requirements include certification of drinking water and wastewater operators. Provincial certification requirements such as those of Alberta and Ontario are well established and can be supported by successful training initiatives such as the circuit rider training programs. The certification processes for remote communities could be similar to those adopted by Quebec.

10) Procurement, construction and commissioning

Some provincial/territorial regulatory regimes do not contain explicit provisions governing procurement (acquisition), construction and commissioning of drinking water and wastewater facilities. However, the importance of these issues, particularly for remote communities, may warrant developing some administrative guidance to accompany regulations.

11) Reporting

Reporting of adverse results and operating performance is covered to varying degrees in provincial regulatory regimes. Reporting water quality for consumers is a relatively new feature that is not well defined in current regulatory regimes in Canada but is a key part of U.S. regulations.

Provinces and Water Boards undertake compliance monitoring, however the municipalities are typically the most significant source of information through reports to the provincial or Board level. Monitoring and reporting requirements are identified in permits, or in the case of BC, in the Municipal Sewage Regulation and through the Liquid Waste Management Plan process.

12) Roles and Responsibilities

Any well-designed regulatory regime should set out clearly and precisely the roles and responsibilities of all parties involved. Coverage of roles and responsibilities would certainly extend to First Nations, Indian and Northern Affairs Canada, Health Canada and may include Environment Canada and any other parties involved.

13) Source water protection

A number of provinces, including Ontario, are in the process of developing source water protection legislation.

14) Third-party audits

An added level of assurance that both the water provider and the regulator are performing their responsibilities effectively can be achieved by requiring third-party audits. To be effective, performance standards defining best practice are needed to provide a benchmark for the audits. Ontario is the only province currently developing a formal third-party audit program, but other provinces have required water providers to retain independent consultants to perform technical assessments of facilities. Less formally, the American Water Works Association has an excellent program called QualServe which encourages peer reviews among its member utilities, including Canadian members.

15) Water withdrawal and use

Explicit regulation governing the rights for withdrawal and use of water from surface and groundwater sources is provided in a number of Canadian jurisdictions including Alberta, British Columbia, Manitoba, Newfoundland, New Brunswick and Ontario.

16) Wells and septic systems for individual service

Most jurisdictions have some regulations governing wells and septic systems for private water supply and waste disposal, but the emphasis of these requirements is on drilling and construction, and occasionally decommissioning, of a well, and cleanout of the septic tank. Regulation is provided in some detail in British Columbia, Manitoba, New Brunswick, Ontario, Prince Edward Island and Quebec. According to the Report of the Expert Panel on Safe Drinking Water for First Nations, regulations governing original well site selection on the basis of a risk assessment and safe operation of wells for individual water service do not exist. The siting, design and servicing of cisterns, septic tanks and percolation fields is inadequately covered; what guidance is provided is often in building codes.

VII. Current Roles and Responsibilities

Provision of drinking water and wastewater services to First Nation communities is a shared responsibility between four groups:

1. ***First Nations*** - First Nation Band Councils are responsible for ensuring that potable water facilities and systems are designed, constructed, maintained, and operated in accordance with the Protocol for Safe Drinking Water in First Nations Communities. First Nations are responsible for maintaining effective sampling, testing, and reporting programs to continuously monitor drinking water quality to ensure that their residents are provided with reliably clean, safe drinking water. In addition, First Nations are responsible for the safe treatment and disposal of wastewater and treatment residues generated on reserve, as well as for all applicable periodic sampling, testing, and reporting of wastewater effluent quality.

2. ***Indian & Northern Affairs Canada (INAC)*** - INAC provides First Nations with financial assistance for designing, constructing, upgrading, operating, and maintaining drinking water and wastewater facilities. INAC also coordinates the review process for First Nations water and wastewater infrastructure projects and reviews project proposals against appropriate engineering standards, guidelines and protocols. INAC also assists in the provision of training and services shared between reserves and municipalities through MTAs (municipal-type agreements). Compliance with the *Protocol for Safe Drinking Water in First Nations Communities* is monitored by INAC.

3. ***Health Canada*** – Health Canada works in partnership with First Nations communities to ensure drinking water quality monitoring programs are in place in communities south of 60°, as per the *Guidelines for Canadian Drinking Water Quality*. These programs include testing and sampling drinking water quality and reviewing, interpreting and disseminating results. In order to build community capacity in environmental health, Health Canada facilitates community-based drinking water quality sampling and testing for bacteriological contamination through support and training of community-based drinking water quality monitors. Health Canada tests drinking water quality for chemical, physical and radiological contaminants and maintains quality assurance and quality control measures. Health Canada also investigates potential problems, provides advice and makes recommendations to First Nations communities and federal partners, such as INAC. Health Canada is also actively involved in the development of community-based education and awareness programs on drinking water issues. In First Nations communities where Environmental Health Programs are transferred, the First Nations are

responsible for drinking water quality monitoring. In addition, Health Canada participates in the review of proposals for First Nations water and wastewater infrastructure projects from a public health perspective to determine whether new or upgraded water systems will be capable of providing drinking water at tap that meets the Guidelines for Canadian Drinking Water Quality (latest edition) and whether new or upgraded wastewater systems are adequately designed to protect the public from potential health risks.

4. ***Environment Canada*** – Environment Canada's roles and responsibilities include the administration and enforcement of federal Acts and/or regulations related to environmental protection, and the provision of information related to regulatory requirements. The existing federal regulatory requirements applicable to the wastewater sector include compliance with:

   - pollution prevention provisions of the *Fisheries Act*;
   - a Canadian Environmental Protection Act, 1999 (CEPA 1999) Notice requiring the preparation and implementation of pollution prevention plans for inorganic chloramines and chlorinated wastewater effluents (2004);
   - a CEPA 1999 Guideline for the release of ammonia dissolved in water found in wastewater effluents (2004); and
   - Guidelines for Effluent Quality and Wastewater Treatment at Federal Establishments (1976).

   From fall 2007 to winter 2008, Environment Canada consulted with First Nations and other interested parties to obtain their input on proposed wastewater effluent regulations under the existing authority of the federal Fisheries Act.

   These proposed federal effluent quality regulations will apply to all wastewater facilities in Canada, including those in Aboriginal communities. Environment Canada is considering all the input received from First Nations and other interested parties to prepare draft regulations for publication in *Canada Gazette*, Part I in 2009 (specific date to be confirmed).

   In addition, Environment Canada participates in the environmental assessment process, as required under the *Canadian Environmental Assessment Act* (CEAA).

VIII. Compliance

Compliance Continuum

Before the coming into force of any regulations, the federal government would work with First Nation communities to assist them in evaluating the requirements for enhancing their capacity in order to meet the new requirements.

This assistance could include technical and financial support from Indian and Northern Affairs Canada through various funding arrangements, and support from Health Canada in enhancing First Nation capacity in environmental health services.

Guiding Principles

The following proposed general principles would govern the implementation of the proposed legislative framework for drinking water and wastewater in First Nation communities:

- Compliance with the federal legislation for drinking water and wastewater on reserve would be mandatory;
- Compliance would be encouraged through communication with parties affected by the federal regulations for drinking water and wastewater on reserve;
- Compliance personnel could administer any legislation in a manner that is fair, predictable, and consistent. Rules, sanctions and processes securely founded in law will be used; and
- Priority for action to deal with suspected violations would be guided by:
    - due diligence;
    - the risk of harm to individuals; and/or
    - whether or not the alleged offence is a repeat occurrence.

Compliance personnel would take action consistent with these guiding principles. Citizens will be encouraged to report suspected violations of the federal legislation for drinking water and wastewater on reserve.

Options for ensuring Compliance

Compliance means conforming with legislation and regulations. Compliance is critical and consequently a well-designed compliance program will be a high priority. Ensuring effective compliance will involve a combination of scientific/technical (i.e. inspectors), medical (i.e. a Medical Officer of Health), legal and policy knowledge. As such, a compliance program would generally include public awareness activities and efforts to ensure voluntary compliance, inspections by the regulator or an independent inspector, a progressive series of enforcement responses and a process for follow-up. An independent redress mechanism to address concerns related to the compliance program is also essential to ensure that the program is perceived to be fair and equitable.

Measures to promote compliance could include:

1. communication and publication of information;
2. public education, with an emphasis on prevention; and
3. provision of technical assistance.

It is proposed that the federal government, First Nations, provinces and territories all be invited to play a role in ensuring compliance with the proposed federal regulations. Discussion of all potential compliance scenarios will take place with participants at the engagement sessions. These scenarios may include the following:

a) compliance promoted by an independent aggregation(s) of First Nations;
b) compliance promoted by provincial/territorial officials;
c) compliance promoted by the federal government; and
d) combination of all scenarios.

a) COMPLIANCE PROMOTED BY FIRST NATIONS

An aggregation(s) of First Nations could have the option of ensuring compliance with the regulations themselves. Should a group of First Nations with the capacity to implement the proposed regulations choose to take on this responsibility, a Memorandum of Understanding (MOU) regarding the assurance of compliance with the regulations would be established between the First Nations, INAC and Health Canada.

The governance of this organization would have to be sufficiently independent of the First Nations operating water and wastewater systems to ensure confidence in and the efficacy of any compliance program it would administer.

b) COMPLIANCE PROMOTED BY PROVINCIAL AND TERRITORIAL OFFICIALS

The proposed option of incorporating by reference, with adaptations, provincial/territorial regulations would create a regulatory regime for a First Nation community that is comparable to that off reserve. This would allow for the possibility of compliance promoted by provincial or territorial officials, as provinces and territories have experience and expertise in the implementation of regulatory regimes for drinking water and wastewater. Federal officials from INAC, Health Canada and First Nation representatives would enter into negotiations with provinces and territories to develop agreements for provincial or territorial implementation of a new federal regulatory regime.

Some First Nation communities may not be open to compliance of a new regulatory regime being promoted by provincial or territorial officials. A solution would be to encourage First Nation's involvement in the process. This would ensure that First Nation expertise and traditional knowledge of drinking water and wastewater systems is utilized. For example, the province or territory could establish a special First Nations Unit within the provincial/territorial regulatory structure that would have the principal responsibility for inspections and compliance with regulations on First Nation lands. The province or territory could also staff the positions within that First Nations Unit with First Nations employees.

It is important to note that compliance with regulations that is promoted by provincial or territorial officials in the context of an agreement would be on behalf of the federal government. This arrangement would not transfer jurisdiction to provinces or territories or First Nation communities.

c) COMPLIANCE PROMOTED BY THE FEDERAL GOVERNMENT

Should negotiations with each province or territory and the First Nation aggregation(s) not be conclusive, the federal government could assume full compliance responsibilities. It is assumed that INAC, Health Canada and Environment Canada would all play a role in the implementation of the regulatory regime for drinking water and wastewater in First Nation communities, according to their respective mandates.

d) A COMBINATION OF ALL SCENARIOS

This option could vary between each province or territory and would require discussion among all parties before defining further.

IX. Questions to Consider

In preparation for the consultation process (winter 2009 engagement sessions), it is suggested that participants review the following questions:

Scope

1) Are there specific elements of provincial/territorial regulations that you think would require modification in order to adapt to the needs of your community, or First Nation communities in general?

2) Do you think the approach of incorporating by reference provincial/territorial regulations and adapting them as required to meet the needs of First Nation communities would be feasible in your community? If not, why?

Elements of a Proposed Legislative Framework

3) What elements listed in the section entitled "Elements of a Proposed Legislative Framework" should be included/excluded from a proposed legislative framework for drinking water and wastewater in First Nation communities?

4) Are there any other elements you think should be included in a proposed legislative framework for drinking water and wastewater for First Nation communities? If so, what are they?

Compliance

5) What do you see as your role in ensuring compliance with the proposed federal legislative framework?

6) Do you think provinces/territories should ensure compliance of new federal legislation? What do you think would be the advantages/disadvantages?

7) Are there other options for compliance that should be considered (e.g. compliance promoted by the federal government, by First Nation aggregations, etc.)? If so, why would they be a better option?

8) How do you think compliance should be promoted? Do you think fines and penalties should be imposed on those who are not in compliance with the legislation? If not, why not? What other solution would you suggest?

9) How do you think roles and responsibilities identified in the section entitled "Current Roles and Responsibilities" should change once the proposed legislation is in force? (Please base your response to this question on the answer you provided for the previous question regarding how you think compliance should be promoted.)

X. Frequently Asked Questions

1) Why is legislation needed?

While legislation for drinking water and wastewater has been developed in provinces and territories, legislation governing drinking water and wastewater in First Nation communities does not currently exist. The *Protocol for Safe Drinking Water for First Nations Communities* (the Protocol) sets out clear standards for the design, operation and maintenance of drinking water systems, but there is no legislative base to ensure compliance with the Protocol. Consequently legislation is required to ensure the same level of health and safety for First Nations as enjoyed by non-First Nation communities.

Federal regulations made under proposed legislation based on the option of incorporating by reference (reproducing) provincial/territorial regulations would contribute to the provision of drinking water and the treatment of wastewater in First Nation communities by ensuring comparability with an existing, well-understood regime. This, is turn, would increase certainty for both the public and operators of drinking water and wastewater systems in First Nation communities.

Providing a similar regulatory environment between First Nation communities and other communities within the same province or territory would provide a common base with which to evaluate the effectiveness of the design, operation and maintenance of drinking water and wastewater systems.

2) What has been the lead-up to this proposed legislative initiative?

In 2005, the Commissioner of the Environment and Sustainable Development (of the Auditor Generals' office) reported and recommended that: "*Indian and Northern Affairs Canada and Health Canada, in consultation with First Nations, should develop and implement a regulatory regime for drinking water in First Nations communities. This regime should be comparable with that in provinces and designed to protect the health and safety of First Nations people.*"

In March 2006, the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians launched the Plan of Action for Drinking Water in First Nations Communities. This Plan of Action included the commitment to establish an Expert Panel to advise on options for an appropriate regulatory framework, including new

legislation. In December 2006, the Report of the Expert Panel on Safe Drinking Water for First Nations was tabled in Parliament.

In June 2007, the Standing Senate Committee on Aboriginal Peoples released a report called: "Safe Drinking Water for First Nations". One of the recommendations was to undertake a comprehensive consultation process with First Nation communities and organizations regarding legislative options, including those set out in reports of the Expert Panel and the Assembly of First Nations, with a view to collaboratively developing such legislation.

In Budget 2008, the Government of Canada committed to investing over $330 million over two years to improve access to safe drinking water in First Nation communities. This included a commitment to undertake consultations with First Nations and provincial and territorial governments on the development of a regulatory regime to oversee water quality on reserve.

3) What legislative options were proposed by the Expert Panel?

In May 2006, the Government of Canada and the Assembly of First Nations announced that an Expert Panel on drinking water would examine options for a regulatory framework for First Nation communities. The Expert Panel held a series of public hearings across Canada over the summer of 2006, hearing from over 110 presenters and receiving more than two dozen written submissions. Presenters included representatives from 39 First Nation communities, 31 First Nation organizations, various provincial and territorial ministries, private-sector organizations, other federal government departments, etc.

Once the public hearings were completed, the Expert Panel produced a report containing a comparative analysis of options for a regulatory framework. In December 2006, the *Report of the Expert Panel on Safe Drinking Water for First Nations* was tabled in Parliament (www.eps-sdw.gc.ca).

In its report, the Expert Panel identified five possible options for creating a regulatory framework for First Nations:

- Existing provincial regimes could be used, as "laws of general application";
- Regulations might be passed by Orders in Council under existing federal statutes;
- Parliament could enact a new statute setting out uniform federal standards and requirements;

- Parliament could enact a new statute referencing existing provincial regulatory regimes (incorporating by reference provincial/territorial regulations); or

- First Nations could develop a basis of customary law that would then be enshrined in a new federal statute.

The Panel suggested that only the last three options were viable.

4) What recommendations were proposed by the Standing Senate Committee on Aboriginal Peoples regarding safe drinking water in First Nation communities?

Recommendation 1:

That the Department of Indian Affairs and Northern Development provide for a professional audit of water system facilities, as well an independent needs assessment, with First Nations representation, of both the physical assets and human resource needs of individual First Nation communities in relation to the delivery of safe drinking water prior to the March 2008 expiration of the First Nations Water Management Strategy;

That upon completion of the independent needs assessment, the Department dedicates the necessary funds to provide for all identified resource needs of First Nation communities in relation to the delivery of safe drinking water;

That a comprehensive plan for the allocation of monies from said funds be completed by June 2008; and

That upon completion of the comprehensive plan, the Department provide a copy to this Committee and appear before it to report on its contents.

Recommendation 2:

That the Department of Indian Affairs and Northern Development undertake a comprehensive consultation process with First Nation communities and organizations regarding legislative options, including those set out in report of the Expert Panel, with a view to collaboratively developing such legislation.

5) Why is INAC proposing the option of incorporating by reference provincial/territorial regulations, with adaptations as required?

The option of incorporating by reference provincial/territorial regulatory regimes is being proposed because it would provide First Nation communities with drinking water and wastewater regulations that are comparable with those off reserve. The federal government recognizes that many provinces and territories have long had legislation in place and the expertise required for ensuring water quality and safety off reserve. A new federal regulatory regime would build upon and adapt, as required, existing provincial or territorial regulations to meet the needs of First Nation communities.

6) What do you mean by "incorporating by reference provincial/territorial regulations"?

The federal government's proposed approach of incorporating by reference provincial/territorial regulations with adaptations as required would enable the federal government to make federal regulations that are comparable to provincial or territorial regulatory regimes but are adapted to the needs of First Nation communities. This flexible approach would enable the Government of Canada to make regulations that, while similar to provincial or territorial regimes, are also appropriate for particular circumstances in First Nation communities.

It should be noted that incorporating by reference provincial or territorial regulations would not take jurisdiction from, or give jurisdiction to, provinces or territories or First Nations, but rather would result in federal regulations that are consistent with provincial and territorial regimes.

7) What are the benefits of a proposed federal regulatory regime that would incorporate by reference provincial/territorial regulations?

Providing a similar regulatory environment between First Nation communities and off-reserve communities within provinces and territories has a number of advantages. First, a similar regulatory environment is fair, in that it provides the same level of protection to public health as neighbouring jurisdictions. This would, in turn, increase certainty for both the public and operators of drinking water and wastewater systems in First Nation communities by providing for a harmonized system that would allow for a more straightforward operating environment. Second, it provides the opportunity for greater and more consistent collaboration between First Nation communities and municipalities on drinking water and wastewater services, whether that be the sharing of drinking water and wastewater systems, training opportunities for First Nation peoples on various aspects of drinking water delivery, the ability to hire contractors

from off-reserve who are familiar with the regulatory regime, or promoting cost effectiveness through economies of scale. Finally, a similar regulatory environment would provide a common base with which to evaluate the effectiveness of the operation, design and maintenance of drinking water and wastewater systems.

8) How would the new legislation work?

Proposed legislation would enable the federal government to make federal regulations governing drinking water and wastewater in First Nation communities.

9) Would proposed federal regulations address the needs of First Nation communities?

Provincial or territorial regulatory regimes for drinking water and wastewater will need to be modified to better meet the needs of First Nation communities. Proposed legislation would give the Minister the authority to modify existing provincial or territorial regulations as required.

For example, most provinces and territories do not have regulations for small water systems and trucked water. Because many First Nations receive drinking water in this manner, provincial and territorial regimes would have to be modified to include such provisions for these drinking water systems in federal regulations.

This flexible approach would enable the Government of Canada to make regulations that, while similar to provincial or territorial regimes, are also appropriate for particular on-reserve circumstances.

10) How would proposed new legislation affect Aboriginal and treaty rights?

Section 35 of the *Constitution Act, 1982* protects existing Aboriginal or treaty rights from infringement by legislation, unless that infringement is justified. Given that the Constitution takes precedence over all other federal laws, non-derogation clauses, which are sometimes included in federal legislation, are viewed to be unnecessary. In addition, there has not yet been any confirmation by the courts on what effect those clauses have.

11) Would proposed legislation apply to all First Nations?

Proposed legislation would automatically apply to all First Nation communities, including treaty First Nations, except self-governing First Nations that are operating under comprehensive self-government

agreements with the Government of Canada. However, where there is an agreement in writing between the Minister and a self-governing First Nation that the legislation should be made applicable to them; the Minister will add the name of this First Nation, by Order, to a schedule of the proposed legislation.

It is also important to note that, while proposed legislation would apply to all First Nation communities across Canada (including those located in the Yukon and the Northwest Territories) it would not apply in Nunavut. This is because Nunavut has no First Nation reserves located within its territory.

12) How will First Nations, provinces and territories be engaged in the proposed legislative process?

In winter 2009, INAC will undertake engagement sessions with First Nations, regional First Nation organizations, and provincial/territorial officials.

Participants at the engagement sessions will be able to discuss and provide input on the elements of a proposed federal legislative framework for drinking water and wastewater in First Nation communities, based on the federal government's proposed approach of incorporating by reference provincial/territorial regulations and adapting them, as required, to meet the needs of First Nation communities.

13) How are INAC's engagement sessions on a proposed legislative framework for drinking water and wastewater related to Environment Canada's *Proposed Regulatory Framework for Wastewater* consulted on in fall 2007/winter 2008?

Environment Canada (EC) consulted First Nations and other interested parties to obtain their input on proposed wastewater effluent regulations under the existing authority of the federal *Fisheries Act*.

These proposed federal effluent quality regulations will apply to all wastewater facilities in Canada, including those in Aboriginal communities.

XI. Additional Comments / Contact Information

Participants will have until April 17, 2009 to provide INAC with any additional comments/concerns/opinions on the proposed approach. Written submissions can be provided at the engagement sessions or sent via e-mail, fax, or mail to the address below. As well, further information on this proposed initiative may be obtained through the contact information below:

Education and Social Development Programs and Partnerships Sector
Community Infrastructure Branch
Strategic Initiatives Directorate
Indian and Northern Affairs Canada
Room 1415
15 Eddy Street
Gatineau, QC
K1A 0H4
Phone: (toll-free) 1-800-567-9604
Fax: 1-866-817-3977
TTY [1]: (toll-free) 1-866-553-0554
Email: eau-water@ainc-inac.gc.ca

An information website on this initiative can be found at the following address:

www.ainc-inac.gc.ca/enr/wtr/h2o/index-eng.asp

Additional links:

Health Canada

http://www.hc-sc.gc.ca/ewh-semt/water-eau/drink-potab/index_e.html

Environment Canada

http://www.ec.gc.ca/water/e_main.html

http://www.ec.gc.ca/eu-ww